P. RM. RAMANATHAN CHETTIAR & ANOR. v. SIVAGAMI ACHI

[O.C.J. (Hill Ag. C.J.) August 12, 1958]

[K.L. — Motion in Civil Suit No. 350 of 1958]

Practice — Service out of jurisdiction — Whether R.S.C., 1957, O.9 r.8A applicable — Partnership business — "Action relating to any business" — Meaning of.

In Civil Suit No. 350 of 1958 the plaintiff alleged that she and the defendants were partners in the firm of V.A.P.S. and the action was for the dissolution and winding up of the partnership. The defendants were residing in India and thus out of the jurisdiction of the Court. Service of the Writ was effected on one P.R. Ramasamy Chettiar who it was admitted was the agent of the defendants carrying on the business of V.A.P.S. within the jurisdiction.

In this motion the applicants (defendants in the Suit) sought to set aside the service of the Writ and all subsequent proceedings on the ground that the provisions of the R.S.C., O.9 r.8A were not applicable to a suit of this nature.

Held: (1) the service under O.9 r.8A was good;

(2) the words "any business" used in O.9 r.8A could only be construed as including a partnership business.

Cases referred to:—

(1) *R.M.K.R.M. v. M.R.M.V.L.*, (1926) A.C. 761; 2 B.L.S.S. 462.

(2) *Alexander Korda Film Productions Ltd. v. Columbia Pictures Corpn. Ltd. & Anor.*, (1946) 1 Ch. 336.

(3) *Holme v. Guy*, 5 Ch.D. 901.

(4) *Thomson v. Lord Clanmorris*, (1900) 1 Ch. 718.

(5) *Pratt v. Cook, Son & Co. (St. Pauls) Ltd.*, (1939) 1 K.B. 364.

(6) *Mahabir Prasad Bhagat v. Balkishun Das*, I.L.R. 1922 Pat. 48.

MOTION IN CIVIL SUIT.

D. G. Rawson for the applicants (defendants): This is a Motion to strike out service of Writ under O.12 r.30. The object of all service is to give due notice to the persons against whom any relief is claimed. The Writ in this case was served under O.9 r.8A of the new Rules. This is identical with Colony O.9 r.8. See *Mallal's S.S. Practice* p. 33. The relevant English rule O.9 r.8A, (see 1957 *Annual Practice* pp. 80-1) indicates limited application; it is to be used with great caution. Service out of jurisdiction is the ordinary rule. Similarly in India see *Goculdas v. Ganeshlal*, I.L.R. 4 Bom. 416 at 422. The Writ is endorsed for declaration that the partnership was dissolved. Assuming that the plaintiff is a partner, this is an action between alleged partners. The place of residence of other partners in India is well-known to the plaintiff. There is no reason why they should not be served personally by using the procedure for service outside the jurisdiction. By serving the agent within the jurisdiction the plaintiff in effect is serving herself.

Dato Sir Roland Braddell and *R. Ramani* for the respondent (plaintiff): The motion raises a very important question of practice. There is no reported case on the precise construction of the Rule. It is not disputed that the person we served is in fact the agent of the Firm of V.A.P.S. having control of its business. The principal and only question at this stage is what precisely is the meaning of the words "action relating to any business". It is submitted *prima facie* this action falls within the ordinary meaning of those words. Two fundamental considerations are to be borne in mind: (1) the present rule O.9 r.8A is a deliberate departure from the corresponding English Rule; (2) it is also a deliberate departure from the law as it was when the new Rules came into force. It is to be noted that the English Rule is limited to contracts entered into within the jurisdiction. Also you have to get leave before service. Here it is entirely different. "Relating to any business" are very wide words. No doubt there is also O.11 r.1 providing for service out of jurisdiction. Therefore we have two means of getting at a man outside the jurisdiction.

The corresponding Colony Rule was first introduced in 1901 by section 3 of Ordinance No. 21 of 1901, adding section 60A to the Civil Procedure Ordinance 1876. It dealt with a special local situation in a special way. In this country the law had to have regard particularly to Chettiar businesses involving large dealings and often immovable properties, with the principals nearly always outside the jurisdiction and carrying on business in the Colony by an agent. See the observations of the Privy Council in *R.M.K.R.M. v. M.R.M.V.L.*[1]. Ordinance No. 31 of 1907 repealed section 60A and substituted section 115, see *van Someren* 3rd Edn. p. 272. In turn section 115 gave place in 1934 to O.9 r.8. The particular rule therefore has existed for well over 50 years and its use was never questioned.

It is further submitted that, where you have two alternatives of service, you are entitled and

ought to choose the cheapest and quickest. See *Alexander Korda Film Productions Ltd. v. Columbia Pictures Corporation Ltd.*(2). If therefore the language of O.9 r.8A applies to a situation, you are entitled to make use of it. The ambit of the very wide words used is illustrated by sub-rule 3 which shows the intention of the Legislature. It is well settled that in arriving at such an intention you are entitled to look at the history of the particular Legislation. See *Holme v. Guy*(3), *Thomson v. Lord Clanmorris*(4), and *Pratt v. Cook, Son & Co.*(5).

On the submission that the Rule departs from the existing procedure, which was based on the Indian Code see sections 66, 74 and 85 of the Civil Procedure Code (Cap. 7). No reported case in the Malay States. In the corresponding Indian Code O.5 r.13 there is the solitary case of *Mahabir Prasad v. Balkishun Das*(6) which limited the Rule to suits against firm only. But, though not actually overruled, the decision has been generally considered not good Law. See comment of Editors of *Chitaley*, 5th edition p. 1661 note 1.

Rawson heard in reply.

Hill Ag. C.J.: — In Civil Suit No. 350 of 1958 the plaintiff and the two defendants are alleged to be partners in the firm of V.A.P.S. and the action is for the dissolution and winding up of the partnership.

The defendants are out of the jurisdiction and residing in India. Service of the plaintiff's Writ was effected on P. R. Ramasamy Chettiar who it is admitted is the agent of the two defendants carrying on the business within the jurisdiction. If a partnership in fact exists it is possible that Ramasamy is also the plaintiff's agent.

The motion asks that service of the Writ and all subsequent proceedings be set aside on the grounds that the provisions of Order IX rule 8A of the Rules of the Supreme Court are not applicable to a suit of this nature.

At the conclusion of counsel's submissions I ruled that the service under Order IX rule 8A was in order and dismissed the motion with costs. I did this to avoid delay in a matter that may be of some urgency but indicated that I would later set out my reasons in writing. That I should do so is, I think, desirable in view of the fact that the point decided is of considerable general importance to practitioners and to the business community and apparently has not previously been considered, though this is strange considering that a similar rule has been in force in Singapore for many years.

The 1957 Supreme Court Rules resulted in a break away from Indian Civil procedure. They follow the English Rules with certain variations to suit local conditions, an example of which is Order IX rule 8A which differs entirely from the corresponding English Rule, so much so indeed that the notes to the English rule are of no assistance whatever in considering the Malayan rule. The latter was a deliberate departure from the English practice and this was done to meet the needs of local business.

Mr. Rawson's argument was that Order IX rule 8A should not apply to a partnership as the defendants' agent, as in the present case, may be also the plaintiff's agent.

I was indebted to Sir Roland Braddell for his learned dissertation on the history, both Indian and local, of this aspect of service where parties are out of the jurisdiction. Sir Roland cited the various Indian and local Enactments and referred me to the cases noted below. * This was not only interesting, but helpful, but in the result my decision had to rest on a construction of the plain English used in rule 8A bearing in mind the nature of Chettiar business and in particular the status of the agent therein. And perhaps no better description of this can be found than in the case of *R.M.K.R.M. v. M.R.M.V.L.*(1), at page 764, where it is stated:

> " First, when a local representative of a Chetty firm carries on the business under the vellasam (i.e., the letters) of the firm coupled with his own distinct name, the announcement to the external world in general is that, whether a co-partner with, or a mere agent of, other persons, he is to be looked upon as a principal. It is to be noted that the vellasam of a firm is not its full style. Next, a local representative of the type described does not label himself as simply an agent. He regularly sues as a principal on mortgage, deeds, bills of sale and promissory notes. The title of his co-partners or principals to immoveables granted in form to him is never abstracted or otherwise shown on the occasion of any sale or qualified disposition. The rights of his principals or co-partners are in truth behind the curtain, much to the disadvantage of the Government."

With regard to Mr. Rawson's contention, there is really nothing peculiar or abnormal in

* *Alexander Korda Film Productions Ltd. v. Columbia Pictures Corp. Ltd. & anor*(2), *Holme v. Guy*(3), *Thomson v. Lord Clanmorris*(4), *Pratt v. Cook, Son & Co. (St. Pauls) Ltd.*(5), *Mahabir Prasad Bhagat v. Balkishun Das*(6).

a plaintiff suing his own agent and, in the present case, in doing so against a possible joint agent the plaintiff not only adopted the quickest and most convenient way of effecting service, but the cheapest. Civil Suit No. 350 of 1958 is clearly an action relating to a business. Ramasamy Chettiar is admittedly the agent of the defendants having control or management of the business at the time of service and the defendants are out of the jurisdiction. All the requirements therefore of rule 8A for service as effected by the plaintiff are here present and I accordingly held that such service was in order under Order IX rule 8A. I am of opinion that the words "any business" used in this Rule can only be construed as including a partnership business.

Motion dismissed.

Solicitors : *Shearn, Delamore & Co.*; *Braddell & Ramani.*

MAT SAWI BIN BAHODIN v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Syed Sheh Barakbah JJ.) January 6, 1958]

[K.L. — F.M. Criminal Appeal No. 4 of 1957]

Criminal Law and Procedure — Provocation — Defence of grave and sudden provocation — Domestic unhappiness — Long standing suspicion of fidelity aggravated by pain — Whether killing amounted to murder or culpable homicide — Misdirection — Penal Code, ss. 300 and 304.

The appellant was convicted and sentenced to death for the murder of his mother-in-law. The question on appeal related to the circumstances in which he killed her. At the trial the different versions of what lead up to the killing showed that there was a long history of domestic troubles and of his suspicions as to his wife's fidelity aggravated by the attitude of the deceased's siding with her daughter. The versions diverge when it came to the night of the killing.

His wife said that on the night in question the appellant complained of pains in his stomach for which she proceeded to massage him. While she was so doing, her mother used very abusive words and an argument arose. So far as she was concerned that was the end of the affair for she was for some reason attacked by the appellant and woke up next morning in Hospital. The appellant in his confession said that his wife, without looking at him, rubbed some oil over his abdomen. He spoke to her but she did not reply. He then spoke to his mother-in-law and drew her attention to her daughter's behaviour and reminded her that this was all due to her allowing his wife to go to work. The deceased began to scold him and accused him of treating her daughter in a rough way. The appellant replied that he was speaking to his wife in a gentle way. He then said: "When my mother-in-law came forward towards me scolding me I picked up a knife which was in the room — the knife used for cutting fowls. When my mother-in-law came towards me scolding me I stabbed my mother-in-law." Then at the trial he described the quarrel during the night and said that as a result his wife had tried to commit suicide and that the dead woman somehow or other received the injuries which proved fatal to her while trying to take the knife away from her daughter.

In his summing-up the learned trial Judge said *inter alia*: "I must tell you that in order to set up the defence of grave and sudden provocation it has to be shown that the provocation was grave, that it was sudden, and that it was such provocation as would cause a reasonable man to lose his self-control. There is only one point in this connection about which I would like to tell you, and that is about the question of suddenness. The only provocation here was a suspicion in the mind of the accused that his wife was unfaithful to him while she was working first on one estate and then on another, and that the deceased was responsible for her going to this work. That suspicion had arisen some time ago and there was no suddenness about it. Therefore in this case the defence of grave and sudden provocation does not arise."

Held: (1) it was not open to the Court of Appeal to decide where, if at all, the truth lay in those stories; neither was it a matter for the trial Judge to decide, though he was entitled to express any opinion he might hold on the point;

(2) the trial Judge had to decide whether or not he should direct the jury that it was open to them if they were not satisfied that murder was made out to find the accused guilty of some lesser offence;

(3) the portion of the summing-up which had been quoted was a misdirection. If what the appellant said at the trial was true he was not guilty of any offence, but if that evidence was rejected he was at the very lowest entitled to have what he had done considered in the light of his confession, and on that there was evidence on which it was open to the jury to find that the killing was not murder but culpable homicide not amounting to murder;

(4) in this case there was sufficient evidence to make the question a question of fact for the jury and not a question of law for the Judge and the appellant had therefore suffered to the extent of having the question adjudicated by the Judge when it should have been adjudicated upon by the jury;

(5) the conviction for murder could not stand and must be quashed. Following *Chan Kau v. R.*(2) the conviction for culpable homicide not amounting to murder in contravention of section 304 of the Penal Code substituted.

Cases referred to:—

(1) *Holmes v. Director of Public Prosecutions,* (1946) A.C. 588.

(2) *Chan Kau v. R.,* (1955) A.C. 206; (1955) 1 All E.R. 266.

The following cases were also cited in argument: *Bullard v. R.,* (1957) A.C. 635; *R. v. Simpson,* (1957) Crim. L.R. 815.